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NO. 85-937

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

STATE OF WEST VIRGINIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF THE STATE OF WEST VIRGINIA

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INTRODUCTION

The brief of the United States demands a reply from the State of West Virginia. The United States inexplicably avoids the clear implication of the federal Debt Collection Act of 1982, which specifically exempted states and their subdivisions from any requirement that interest be collected on their obligations. Congress having made clear its policy, it is completely inappropriate for federal courts, exercising interstitial authority, to make common law in areas where Congress' intent is clear, and to thereby award prejudgment interest. The United States also gives a strained and incorrect interpretation of the statutory purpose of the Disaster Relief Act--which was to provide assistance to disaster stricken states, not to impose heavy financial burdens on

states that accept federal assistance. The United States' argument that an award of "interest" is a usual and necessary incident of any suit in which the State lacks jurisdictional immunity is completely inconsistent both with previous case law on intergovernmental litigation and with statutory and judicial treatment of the United States' liability for interest where it has waived its own jurisdictional immunities from suit.

With respect to the facts relevant to the question of whether the Court of Appeals erroneously reversed the district court's discretionary decision not to award prejudgment interest, the brief of the United States is inaccurate in important respects. The United States persistent implication that the State of West Virginia did nothing to aid its

citizens in the face of this disaster is patently untrue. The record is clear that the State of West Virginia made a substantial commitment to the cleanup work after the Buffalo Creek and Gilbert Creek floods.[1] The Governor of West Virginia in sworn testimony explained that the State appropriated and spent approximately $2.2 million for (1) securing of the valley in terms of persons and property, such as for National Guard expenses and cleanup projects, and (2) restoration of the valley, such as for water and sewer

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[1] In addition to suffering through the 1972 flood, the Town of Man has had to endure being called "Maris" by the Fourth Circuit, and "Mann" by the District Judge and in the government's brief. We would ask the Court to restore Man to its original status. (R. 530-532)

service. (R. 1091-1093) The $2.2 million contribution by the State was many times the contribution, on a proportionate population or budget basis, of that made by the federal government.

The district court balanced the equities in favor of the State and denied interest to the federal government for important reasons that are well substantiated in the record.

I. A DIFFERENT SET OF RULES APPLIES IN INTERGOVERNMENTAL LITIGATION AS OPPOSED TO GOVERNMENTAL LITIGATION WITH PRIVATE LITIGANTS.

Initially, we must put to rest the conclusion of the United States and the Fourth Circuit that the same rules on interest apply when a state is a litigant against the United States as when a private party is the litigant.

If a state and a private litigant had identical interests, then perhaps Royal Indemnity[2] and its progency would appropriately be applicable. No such identity of interests exist, and the application of commercial litigation cases to the case at bar should not occur. As this Court has stated:

> "The litigation is not between the United States and a private litigant, but between the United States and the political subdivision of a state. In effect, therefore, we have another aspect of our task in adjusting the interests of two governments within the same territory." Board of Commissioners v. United States, 308 U.S. 343, 350 (1939).[3]

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[2] 313 U.S. 289 (1941).

[3] Despite the constant referencing of Board of Commissioners in the State's brief to the Fourth Circuit, that court did not cite the case when it rendered its opinion. Board of Commissioners is the case most analogous in its fact to the case at bar.

For that reason courts have been almost uniform in their refusal to award interest against a government in litigation. The taxpayer is innocent and he should not be further punished by having to foot the bill for prejudgment interest.[4] The rule of protecting the taxpayer is easy to apply when the litigation involves the government and a private litigant. When two governmental units are in litigation, however, the court is required to adjust the interest of two groups of innocent taxpayers. Furthermore, legislatures cannot be expected to act with the normal reaction

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[4] As this Court has noted, interest has historically been awarded as a penalty. Library of Congress v. Shaw, ___ U.S. ___, 92 L. Ed. 2d 250, 257 n.2 (1986).

time of a private party. The common law's prohibition, or at least deep reluctance to impose interest against a sovereign therefore has a sound basis. A state is not a private litigant and the attempt to equate the two is error.

"States occupy a special and specific position in our constitutional system" and when they interact with the federal government, then the scope of federal authority "must reflect that position."[5] Therefore, the general federal rule of always awarding prejudgment interest is inapplicable. Board of Commissioners, supra.

The Fourth Circuit is also plainly wrong in its categorization of interest

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[5] Garcia v. San Antonio Metropolitan Transit Authority, 469 U. S. 528 (1985).

as part of "the ordinary incidents of suit." 764 F.2d at 1033, as well as its claim that both sides should have expected to pay interest in case of a breach, id. The United States never pays interest, absent act of Congress, even to a state. United States v. Louisiana, 446 U.S. 253 (1980). Further in the only two cases in which this Court has addressed the issue of a state paying interest to the federal government, both decisions denied such an award. Board of Commissioners, supra; United States v. North Carolina, 136 U.S. 211 (1890). In short, there is no federal common law rule mandating awards of interest against states.[6]

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[6] The United States has been able to cite only one case, apart from the (Footnote Continued)

II. WHETHER THIS COURT FOLLOWS THE INTENT OF CONGRESS, THE ADOPTION OF STATE LAW OR A BALANCE OF THE EQUITIES, THE DECISION BELOW SHOULD BE REVERSED.

What rule of decision should apply in intergovernmental litigation? Any of the four approaches in Part II would

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(Footnote Continued)
instant one, in which any court has awarded interest against a state and in favor of the federal government. United States v. California State Bd. of Equalization, 650 F.2d 1127 (9th Cir. 1982), aff'd, 456 U.S. 901 (1982). The question of interest was not raised before this Court; the only issue presented in the Jurisdictional Statement was whether the state tax in question could constitutionally be applied to receipts from leases by the United States. Therefore, the issue of prejudgment interest was not before this Court. Indeed, the Ninth Circuit's opinion on the interest issue is cursory, appearing in its entirety at 650 F.2d at 1132, and does not even cite, much less discuss, this Court's opinion in Board of Commissioners v. United States, 308 U.S. 343 (1939).

result in a reversal of the decision below.

A. CONGRESS IS VESTED WITH THE PRIMARY RESPONSIBLITY TO DETERMINE IF PREJUDGMENT INTEREST SHOULD BE AWARDED, AND ITS REFUSAL TO SO ORDER SHOULD BE RESPECTED.

In our federal system of government it is inevitable that friction will occur between the states and the national government. In analyzing the battlefield of federalism this Court, in Garcia, rejected a constitutional limitation on the federal government in favor of already built-in safeguards:

> "State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." 469 U.S. at 552

> "The political process ensures that laws that unduly burden

the states will not be promulgated." Id. at 556[7]

Because of the delicate nature of the federal-state relationship, this Court has not given the executive branch carte blanche power to operate, but rather has required a "clear" expression of Congress to authorize interference with states' interest. Bowen v. American Hospital Association, 476 U.S. ___, 90 L. Ed. 2d 584 (1986); Pennhurst State School and Hospital v. Halderman,

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[7] One of those sovereign interests to be protected by the "political process" is the interest of a state in planning its budget and not being adversely affected by unpredictable depletions of state resources, e.g. prejudgment interest. The general policy interests in avoiding adverse fiscal impact on states has been recognized by this Court. See e.g. Edelman v. Jordan, 415 U.S. 651, 665 (1974).

451 U.S. 1 (1981).[8] Congress will not be lightly assumed to have changed the balance of power until it speaks with this clear voice.

More specifically, it is Congress, not the judiciary, who protects the federal purse. United States v. Standard Oil Co., 332 U.S. 301, 314-315 (1947). If Congress wants to change the common law and have interest assessed against states, it certainly can. For the judiciary to make such interstitial law in the fiscal area is not warranted,

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[8] "'[T]he rule of strict construction [of statutes in derogation of sovereignty] serves a quasi-constitutional purpose in our federal system of split sovereignty by helping to secure both levels of sovereign power against encroachment by each other." Bowen, 90 L. Ed. 2d at 608, at n. 33 citing 3 C. Sands, Sutherland on Statutory Construction § 62.01 p. 64 (4th ed. 1974).

particularly when it is at the expense of another set of taxpayers.

In making a review of the pertinent enactments, it is obvious that Congress has not authorized interference with the sovereign interest of the states in prohibiting the award of prejudgment interest.

1. THE DEBT COLLECTION ACT OF 1982 EXEMPTS STATES FROM BEING ASSESSED PREJUDGMENT INTEREST BY THE FEDERAL GOVERNMENT.

The Debt Collection Act of 1982 expresses the intent of Congress as to when interest is to be awarded against a state and in favor of the federal government, and the expressed intent in the Act is that interest should not be imposed on states. This expression of Congress is important:

> "[W]hen Congress addresses a question previously governed by a decision rested on

> federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." Milwaukee v. Illinois, 451 U.S. 304, 214 (1981).

By the passage of the Debt Collection Act of 1982 the United States Congress has "displaced" federal common law on the subject. In this codification, 31 U.S.C. § 3717(a)(1) authorizes the federal government to charge interest on debts due the federal government. By 31 U.S.C. § 3701(c) Congress excluded states from this provision.[9] As a comprehensive bill on

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[9] The author of the amendment that exempted the states, Senator Percy, expressed his view of the purpose in a letter to the Comptroller General dated November 21, 1983, wherein he expressed his view that the Act abrogated common law, and left Congress free "to legislatively pick and choose according to circumstances, those sitations in which

(Footnote Continued)

the collection of debts due the federal government, it displaces federal common law on the issue. Both the Second and Third Circuits have considered the impact of the Debt Collection Act of 1982 and both have concluded that it not only abrogates any common law but that it also disallows any award of prejudgment interest against states. Commonwealth of Pennsylvania v. United States, 781 F.2d 334 (3rd Cir. 1986); Perales v. United States, 598 F. Supp. 19 (S.D. N.Y. 1984), aff'd 751 F.2d 95 (2d Cir. 1984).

Congress has now spoken on the prejudgment interest issue and has

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(Footnote Continued)
the government might assess interest against those entities exempted by the Act." Pennsylvania, 781 F.2d 333, 341 at n. 10.

indicated its preferences for a general "no interest" rule except where it, by specific legislative enactment, dictates otherwise. Any deviation from the expressed intent of Congress by judicial lawmaking would be inappropriate.[10]

2. THE LACK OF ANY CLEAR EXPRESSION OF CONGRESS TO IMPOSE INTEREST WITHIN THE DISASTER RELIEF ACT REQUIRES THAT STATE SOVEREIGN INTERESTS BE RESPECTED AND A "NO INTEREST" RULE APPLIED.

Section 226(a) of the Disaster Relief Act, upon which the United States so heavily relies, states:

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[10] Although in the State's original brief West Virginia argued that the Debt Collection Act was not controlling but rather an additional indicia of national policy, upon closer reading of the cases, the State now believes that the passage of the Act displaced any common law right and would control. Although the cause of action arose many years

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"Any mobile home or readily fabricated dwelling shall be placed on a site complete with utilities provided either by the state or local government, or by the owner or occupant of the site who was displaced by the major disaster, without charge to the United States. However, the Director may elect to provide other more economical and accessible sites at federal expense when he determines such action to be in the public interest."[11]

(Footnote Continued)
prior to the passage of the Act, the actual award of interest did not occur until after the passage of the Act.

[11] The brief of the federal government notes that the Disaster Relief Act of 1970, Pub. L. No. 9-606 84 Stat. 1744 et seq. was repealed in part by Pub. L. No. 93-288, § 603, 88 Stat. 164. The only part of the 1974 amendments relevant to the current case changed "The Director" to "The President" in the part of the Act that delineated who was authorized to provide temporary housing to disaster victims and as to who could opt to place those mobile houses on sites at federal expense. Practically it has no effect as additional regulations were promulgated to implement the provisions as a

(Footnote Continued)

In essence, the government argues that the words "without charge" compel the award of prejudgment interest against the State. Such reliance is unfounded for several reasons.

First, the word "charges" cannot be assumed to mean "interest." This past term this Court held that the word "costs" does not include interest even in the area of civil rights policy notwithstanding the strong Congressional policy of supporting enforcement litigation. Library of Congress v. Shaw.

Second, there is no legislative history whatsoever in the Disaster Relief Act of 1970 which discusses

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matter of federal policy, see 44 C.F.R. 205.52(K) (1986) and 44 C.F.R. 205.101 (1986) which such regulations seemed to have expanded federal intervention.

charges, interest, or even when states are to pay part of those charges. The "clear voice" needed to change the fiscal relationship between and the states and the federal government is totally lacking in this enactment.

Third, the federal government may pay the charges instead of the states. It is therefore not an important policy for the states to pay.

Fourth, even if the federal government does not pay the charges, it is not necessary for the states to pay. Local governments or private owners could also pay.

No Congressional intent to impose interest can be found. It is instructive to examine other statutes which help illuminate why the language of the Disaster Relief Act falls far

short of imposing interest against the State.

(a) Language in Title VII Placing the United States in the Same Position as a Private Person Was Insufficient Expression to Abrogate Immunity From Interest.

To be contrasted with the "without charge" language of the Disaster Relief Act is the recently interpreted provisions of Title VII, which provides that:

> "[T]he United States shall be liable for costs the same as a private person." 42 U.S.C. § 2000e-5(k).

In Library of Congress v. Shaw this Court found the above-quoted enactment of Congress, that seemingly places the United States on a par with a private litigant, insufficient to constitute a clear expression of Congress to waive immunity from interest. If language as explicit as found in Title VII is not

sufficient to express the clear intent of Congress to waive the "no interest" rule then a fortiori, the "without charge" language of the Disaster Relief Act is insufficient to overturn West Virginia's immunity from interest.

(b) Social Security and Medicaid Statutes Demonstrate a Clear Expression of Congress as Contrasted with the Implicit Cost Sharing Provision in the Disaster Relief Act.

In the Social Security statute Congress provided: "There shall be added, as a part of accounts due, interest at a rate of 6 per centum per annum from the date due until paid." 42 U.S.C. § 418 (j). This statute contains a clear expression of Congress that requires payment of prejudgment interest. Compare also the language of the Medicaid Act which specifies the amount of recovery "plus interest on

such amount disallowed beginning on the date such amount was disallowed and ending on the date of such final determination at a rate (determined by the Secretary) based on the average of the bond equivalent of the weekly 90-day treasury bill auction rates during such period." 42 U.S.C. § 1396b(d)(5). In both of those instances the will of Congress is clearly expressed. The statutes speak in terms of "interest" being assessed and they delineate the rate of interest. A strained and desperate construction of an implicit cost-sharing provision, as expressing the intent of Congress to award prejudgment interest, does not stand up to the light when compared with actual clear expressions such as found in the Medicaid and Social Security statutes.

(c) Stronger Language Found in the Food Stamp Act Has Been Held Insufficient To Support An Award of Prejudgment Interest.

In another statutory context the Second and Third Circuits have construed language of the Food Stamp Act, which provides that states "shall be strictly liable to the Secretary for any financial losses involved in the acceptance, storage and issuance of food stamps." 7 U.S.C. § 2016(f). Neither circuit allowed an award of interest to the federal government, holding alternatively that the "clear voice" requirement of Pennhurst I was not satisfied and that the Debt Collection Act of 1982 forbids the awards. Commonwealth of Pennsylvania v. United States, 781 F.2d 334 (3rd Cir. 1986); Perales v. United States, 598 F. Supp. 19 (S.D. N.Y. 1984) aff'd "for substantially the reasons

stated in the district court's opinion." 751 F.2d 95 (2d Cir. 1984) In the Food Stamp context states were made "strictly liable" for losses yet neither the Second or Third Circuit concluded the "strict liability" included interest (the time value of money being properly excluded). If anything the food stamp language is stronger than the implied cost sharing language relied on by the federal government in the current case.

B. ADOPTION OF STATE LAW AS THE RULE OF DECISION IS URGED BY THE SOUND DICTATES OF FEDERALISM.

West Virginia believes that federal common law should adopt state law as its rule of decision regarding prejudgment interest inasmuch as no federal policy exists in the current litigation that outweighs the interests states have in preventing the displacement of state

law, and the unpredictable depletion of state treasuries. When a federal court must create a federal common law rule of decision, then "the scale of the balances are weighed in favor of borrowing state law to fashion the federal rule of decision." United States v. California, 655 F.2d 914, 917 (9th Cir. 1980). Solicitude for state interests, as expressed in prior opinions of this Court, requires such a result. United States v. Yazell, 382 U.S. 341 (1966); Board of Commissioners v. United States, 308 U.S. 343 (1939). This argument was amply addressed in the State's initial brief.

C. SOUND PUBLIC POLICY CONSIDERATIONS SUPPORT THE APPLICATION OF A "NO INTEREST" RULE IN THE CONTEXT OF THIS LITIGATION.

The multiplicity of modern federal-state interactions provides a basis for the policy rationale which supports a "no interest" rule. Because nearly one-third of all state revenues are derived from federal grant or revenue-sharing programs,[12] federal audits and changing policies will continue to yield significant disputes between the states and the federal government concerning expenditures and accountability. See e.g. Bennett v. New Jersey, 470 U.S. 632 (1985);

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12 Advisory Commission or Intergovernmental Relations, Significant Features of Fiscal Federalism, 1979-80 Edition 161 (1980).

Bennett v. Ky. Dept. of Education, 470 U.S. 656 (1985); Bell v. New Jersey, 461 U.S. 773 (1983). States, particularly poorer states, may thus be precluded from fully litigating their disputes with the federal government, despite good faith belief in the propriety of their position, see e.g., Bennett, 105 S. Ct. at 1550, for fear that they will also be held liable by a federal court for prejudgment interest.[13] As the federal budget crunch intensifies, the

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[13] In an analogous situation, Justice Stevens, in his concurrence in General Motors Corp. v. Devex Corp., 461 U. S. 648, 658 (1983), noted that the award of prejudgment interest in patent cases should consider "public interest in patent litigation" as a factor against the awarding of prejudgment interest so as to not discourage "good faith" litigation which provides more informed decisions on federal policy through judicial scrutiny of that policy.

tendency of the federal bureacracy to balance the budget on the backs of the states could cause disaster. As this case illustrates, the budgetary impact of such unascertainable liabilities can be very substantial for the states. An unexpected judgment of $5.8 million against West Virginia will cause curtailment of services, as West Virginia like most states, operates on a very tight budget.[14] In the short interim since the Fourth Circuit issued its decision below creating this "new" rule of federal common law, the Fourth Circuit decision has been cited as compelling

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[14] One Senator has suggested that in the early year Congress used the carrot and stick approach to get states to participate and administer federal social programs, and in the advent of Gramm-Rudman the carrot is gone and what once was a stick is now a large club.

the award as a "matter of right" in other contexts. See e.g., Commonwealth of Pennsylvania v. United States, 781 F.2d 334, 341 (3rd Cir. 1986) (food stamps) Riles v. Bell, No. 85-2749 (9th Cir.) (education, case stayed pending disposition of this appeal).[15]

Another factor that distinguishes a state from a private litigant is the nature of the budgetary process. When a judgment is awarded against a state, it cannot merely write a check for the amount. While a potential judgment amount is ascertainable, an award

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[15] Because of the tremendously adverse impact this case could have on state treasuries, 27 states filed a brief amici curiae asking that a writ of certiorari be granted in the current case, West Virginia v. United States.

of prejudgment interest is not. The rate of interest versus the time of entry of an award present two factors almost impossible to predict. The former requires accurate prediction of the market while the latter requires prediction of court schedules, discovery deadlines and numerous other factors which influence trial dates and court decisions. In the current case West Virginia, on a questionable obligation incurred in 1972, was not informed of a demand for interest until 1978, which such demand was refused by the district court in 1982, awarded by the circuit court in 1985, and if paid, could not be

presented for payment until 1987 or 1988.[16]

D. SHOULD THIS COURT ADOPT THE BALANCING TEST UTILIZED BY THE DISTRICT COURT THEN, AGAIN, NO INTEREST SHOULD BE AWARDED.

If the Court takes the alternative approach to the award of interest by balancing the equities, the State of West Virginia will likewise prevail, because the District Court balanced the equities in favor of the State and did not abuse his discretion.

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[16] The federal government's argument that the fact West Virginia is not immune to suit by the United States consequently abrogates immunity from interest confuses concepts of immunity from suit with that of immunity from interest. The abrogation of immunity from suit does not abrogate immunity from interest. Library of Congress v. Shaw, ___ U.S. ___, 92 L. Ed. 2d 250, 263 (1986).

1. After ruling for the United States on the issue of the debt being owed, in a supplemental opinion, Judge Ramsey ruled for the State of West Virginia on the issue of interest being owed on the debt. The District Court took the approach that the issue of interest was to be decided by a balancing of the equities. Because both parties are governments, however, there must be "due consideration to the fact that defendant herein is a sovereign, not a private litigant." (Petition for Certiorari, Appendix C (hereinafter C) 26-27) The District Court then refused to award interest based upon "the Congressional intent underlying the Disaster Relief Act of 1970 and the relative equities between the parties." (C 27) The Court considered four factors: (1) The purpose of the

Disaster Relief Act was to provide relief to victims of natural disasters such as had occurred in West Virginia; (2) the obligation entered into by West Virginia was not a truly voluntary act, but one the State had to do because of acts of nature; (3) prejudgment interest would create "an undue hardship upon [the] citizens" of West Virginia, "an additional an unwarranted burden or penalty on people who have suffered enough," (C 28); and (4) Congress has considered the aid of people in natural disasters to be a national problem, and it would be more equitable for all citizens in the United States to defray the costs of the service. Such careful reasoning by the trial court, who was also the trier of fact (the jury being advisory only) was swept aside by the Court of Appeals in peremptory fashion.

The Supreme Court should reinstate the careful balancing by the trial court, which in no way could be considered clearly erroneous nor an abuse of discretion.

2. Before and throughout the litigation the State acted in good faith.[17] The issue of whether the State owed the federal government the $4.2 million debt was a serious, good faith dispute about which reasonable minds did in fact disagree. Initially, Judge Copenhaver[18] denied summary judgment,

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[17] Although the disaster occurred in 1972, suit was not filed by the government until 1978. It was not before the latter date, six years later, that the government first indicated that it wanted interest starting in 1972.

[18] United States District Judge John Copenhaver and all other district judges in West Virginia's two federal (Footnote Continued)

ruling that the State had no statutory duty to pay the debt, and stating that a trial must be held to resolve the intentions of the parties when the grant was made. Subsequently, the advisory jury unanimously held in favor of the State, a decision Judge Ramsey chose not to follow. Finally, Judge Ramsey ruled with the State on the interest issue, due in part to the vagueness of the initial agreement between the government and the State.

The government's brief points only to the financial commitment to pay for the rehabilitation of the flooded area,

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(Footnote Continued)
districts subsequently disqualified themselves when a trial was to commence, due to familiarity with the Governor and other witnesses. District Judge Norman Ramsey of the District of Maryland was then appointed to hear the case.

but ignores that the State too made a commitment, one that was proportionately many times greater. The State spent $2.2 million directly, money used, for example, for new schools and for leasing housing property. The federal government with a population of more than one hundred times that of West Virginia, spent about fifteen times the State's sum.[19]

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[19] The Fourth Circuit misread the record when it stated that the debt to the federal government was set aside in the State budget, and the State is enjoying a windfall of interest. It is important to correct this error. The State set aside the $4.2 million after Judge Ramsey's decision, when the Judge also ruled the State owed no interest. No money for prejudgment interest has been set aside, and this sum would have to be appropriated by a future session of the West Virginia Legislature. Thus the 1987 Legislature would have to pay interest on a debt incurred in 1972, about which interest was not demanded by

(Footnote Continued)

3. The trial judge found that the State did not enter into the contract as a "voluntary act." This conclusion of fact, not challenged by the Court of Appeals or the government, was the result of three important factual matters heard by the district court. First, the State faced a chaotic and desperate situation after the tragedy, which cost 125 lives, left thousands homeless and destroyed millions of dollars of property. Any effort to help by anyone was, not surprisingly, accepted without hesitation. Second, the State received erroneous advice (made, undoubtedly, in good faith) from the federal disaster coordinator,

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(Footnote Continued)
the government until 1978, and which was not determined owed until 1985.

himself in charge of a major disaster for the first time in his career, that the State was required as a matter of federal law, to pay for the services. (R. 929, 930, 931, 934, 940, 952, 956, 977) In reality, the statute envisions a multiplicity of options for the federal official: payment by the state, payment by local governments, payment by private citizens, payment by the federal government or a combination of any of the above four choices. Third, on both the federal and state side, subordinate officials did not report properly to their superiors or to the other side. For example, the Corps of Engineers did not follow their own procedures which would have advised the State of the extent of the financial obligation, and would have sought periodic authorization from the State for increased

expenditures. (R. 734). The state official working most closely with the Corps of Engineers committed the state to pay for obligations totalling millions of dollars, despite his department having been appropriated only $25,000.00 to pay for such debts.

4. The relative size and economic situation of the two sovereigns, both in the aftermath of the flood and today, favor the State, and was a factor in the decision by the trial court. In Board of Commissioners this Court stated that in making a decision to award interest "nothing seems more appropriate than due regard * * * for local interests." 308 U.S. at 351. West Virginia has had the highest unemployment of any state in the union for much of the past several years. The State ranks near the bottom in per capita income. The relative

sizes of the entities is worth noting. If one were to consider the relative sizes of the state and federal budgets, it would take a judgment against the federal government of $4.2 billion to have an impact on the federal government that is comparable to the impact of the judgment below on West Virginia.

5. The United States ignores the rationale of this federal statute, which recognizes that state and local governments lack the resources to deal with major natural disasters. Fundamental fairness argues against concluding that it is equitable for the federal government to assist a state with a disaster, because of the state's inability to deal with the enormity of the costs of the disaster and then to go to court to seek millions of dollars in interest from the state.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I, J. Bradley Russell, a member of the Bar of the Supreme Court of the United States, do hereby certify that I served the enclosed Reply Brief upon Honorable Charles Fried, Solicitor General of the United States, by causing said copies thereof to be hand delivered this 3rd day of November, 1986, addressed as follows:

Honorable Charles Fried
United States Solicitor General
Department of Justice
Tenth and Constitution Avenue
Washington, D.C. 20530

J. Bradley Russell
J. BRADLEY RUSSELL